Second Civil Number B192627

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NORMAN K. MORROW

*Plaintiff and Appellant*

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT,
ROY ROMER and ROWENA LAGROSA

*Defendants and Respondents*

---

Appeal from the Superior Court for Los Angeles County
Honorable Susan Bryant-Deason, Judge
(Case Number BC349335)

---

# APPELLANT'S OPENING BRIEF

---

Attorneys for Plaintiff and Appellant Norman K. Morrow
PARKER & COVERT, LLP.
Henry R. Kraft (Bar No. 050931)
17862 East Seventeenth Street
Suite 204, East Building
Tustin, California 92780
Telephone: (714) 573-0900
Facsimile: (714) 573-0998

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page**

## STATUTES

## ATTORNEY GENERAL OPINIONS



## CALIFORNIA RULES OF COURT

## INTRODUCTION

Plaintiff and Appellant Norman K. Morrow ("Appellant") was a highly respected public educator who became the scapegoat for systemic problems that exist in the Los Angeles Unified School District. On April 14, April 18, and May 24, 2005, a series of violent disturbances occurred at Thomas Jefferson High School in Los Angeles ("Jefferson"). Rather than address the issues that were at the root of the violence, Defendants and Respondents Roy Romer ("Romer"), Rowena Lagrosa ("Lagrosa") and the Los Angeles Unified School District ("LAUSD" or "District") wrongfully blamed Appellant for the disturbances by airing confidential personnel matters in public.

In May 2005, Appellant was removed from his position as principal of Jefferson. He was not told the reasons for his removal, and did not learn the reasons until he read the front page of the June 1, 2005 edition of the *Los Angeles Times*. Romer, rather than following well-established procedures for dealing with personnel matters concerning public employees, unilaterally publicized the alleged reasons behind Appellant's removal. Romer's statements questioned Appellant's leadership abilities and criticized his retirement plans. The timing, content and form of the comments violated Appellant's constitutional, statutory, and contractual rights to confidentiality in personnel matters.

After the statements were published and Appellant was removed, Appellant suffered, and continues to suffer, personal and professional embarrassment and humiliation in the community. The statements have falsely and adversely impacted Appellant's professional reputation, career and earning capacity.

The disturbances at Jefferson are an example of the numerous incidents of violence that plagued LAUSD schools in 2005. (CT 10).[1] The Jefferson campus, among others, lacked adequate staffing and security to protect the students and the campus staff. (CT 8). Appellant, as principal, was made a scapegoat to deflect blame from the Superintendent's office and the Board of Education's failure to address the institutional inadequacies. (CT 10). Based on Appellant's subsequent transfer from Jefferson to a dead-end job, he was constructively discharged and forced to retire. (CT 135-136).

This action was filed on March 21, 2006. The complaint includes causes of action for invasion of privacy (First cause of action) and defamation (Sixth cause of action). (CT 4). Respondents immediately propounded discovery. On May 23, 2006 Respondents filed a special motion to strike the First and Sixth causes of action under Code of Civil Procedure section 425.16, which is the subject of this appeal. (CT 65).

---

[1] The Clerk's Transcript is referred to herein as "CT."

The trial court granted the anti-SLAPP motion and awarded Respondents attorneys fees. (CT 355-356).[2] The court also struck portions of declarations Appellant submitted in support of his opposition to the motion to strike. (CT 355-356).[3] This appeal resulted therefrom.

Appellant's First and Sixth causes of action were not the proper subject of a special motion to strike under Code of Civil Procedure section 425.16. Respondents failed to show that Romer's statements arose from protected speech activity. To the contrary, the statements were made in connection with a personnel matter which required confidentiality and due process. Romer did not act as an ordinary citizen when he spoke to the *Los Angeles Times*. He was a public official with constitutional, statutory and contractual duties to protect the confidentiality employee personnel information.

Romer's statements did not concern a public issue, were not privileged, and were prohibited by law and public policy. Moreover, there is a probability that Appellant will prevail at trial on his claims of invasion

---

[2] "SLAPP" stands for "Strategic Lawsuits Against Public Participation." (*Zamos v. Stroud* (2004) 32 Cal. 4th 958, 963 at n.3.)

[3] On November 14, 2006 the record was augmented to include the documents which the trial court considered in striking the declarations, as well as one of the stricken declarations. These documents are included in Appellant's Request for Judicial Notice, filed concurrently herewith and referred to herein as "RJN."

of privacy and defamation. The trial court's award of attorney fees to Respondents was not warranted.

## STATEMENT OF APPEALABILITY

This appeal is from the order of Judge Susan Bryant-Deason of the Los Angeles Superior Court, granting Respondents' special motion to strike Appellant's First and Sixth causes of action and awarding attorneys fees. This appeal is authorized by Code of Civil Procedure section 425.16, subsection (i).

## STATEMENT OF FACTS

Between 1967 and 2005, Appellant enjoyed a distinguished career as an educator, with a stellar reputation for serving as principal of several inner city schools. (CT 7). In 2001, Appellant was recruited by Bonnie Rubio ("Rubio"), former Superintendent of LAUSD, District H, based on his success working with communities and motivating students and staff at under-achieving secondary schools. (CT 7, 125).

Appellant was selected for employment by LAUSD following the recommendation of a LAUSD-appointed committee consisting of parents, students, staff, and committee members. (CT 7). Rubio assigned Appellant to Jefferson, considered one of the most challenging inner-city schools in the LAUSD. (CT 7).

/ / /

Appellant immediately began the challenging task of changing the school culture of Jefferson, a traditionally low-achieving high school. (CT 7). He was faced with issues of low expectations, academic failure, safety, security, poor environmental climate, overcrowding, poor staff preparation and school culture. (CT 7).

Under Appellant's leadership, Jefferson significantly improved its academic standing. During his second year as Jefferson principal, Academic Performance Index ("API") test results improved by 56 points. During his third year, the API test results increased another 22 points. (CT 7). Appellant was responsible for numerous improvements to the school within the first 36 months of his employment, including a reorganization of the student counseling center, weekly administrative meetings, and compliance with state education requirements. (CT 7).

During 2005, LAUSD experienced a number of violent student disturbances. Outbreaks of violence occurred at numerous high school campuses in Los Angeles, including Jordan High School, Locke High School, and Manual Arts High School. (CT 10). On April 14, 2005, the epidemic of violence reached Jefferson. (CT 8). Two additional disturbances occurred at Jefferson on April 18, and May 24, 2005. Several students were injured and others were arrested as a result. (CT 8).

The disturbances at Jefferson increased media coverage concerning

LAUSD and school violence. LAUSD officials were criticized for not doing more to solve the District-wide epidemic of violence in its schools. (CT 139).

On May 31, 2005, Romer stated to a reporter the *Los Angeles Times* that Appellant "had retirement plans that did not fit with the District's needs," and that Appellant's handling of the April and May 2005 disturbances had "accelerated" a decision to replace him. (CT 46, 48). Appellant's qualifications or job performance were not a topic of public discussion when Romer made the statements. (CT 345).

Appellant was subsequently removed from his position as principal of Jefferson. (CT 346). The District provided no explanation for the action. Appellant did not learn the alleged reasons for his removal until he read Romer's statements on the front page of the June 1, 2005 edition of the *Los Angeles Times*. (CT 46). Appellant never received a single negative evaluation from the District. (CT 345).

Under LAUSD's collective bargaining agreement ("CBA") with the Associated Administrators of Los Angeles ("AALA"), Appellant was entitled to notice of transfer or reassignment. (CT 250). Article IX of the CBA, "Administrative Assignments and Transfers," states in Section 1.7 that "The employee shall be informed and counseled regarding the transfer and written reason(s) for such transfer shall be supplied to the employee

upon the employee's request. Definitive reasons for the transfer will be given and a conference held with the employee prior to the change of assignment." (CT 250). Neither the District, Romer nor Lagrosa complied with the requirements of the CBA.

Moreover, to the extent that Romer's statements implicated any performance deficiencies or inability to provide leadership on Appellant's part, Appellant was entitled to notice of disciplinary action, the basis thereof, and an opportunity to respond. (CT 312).

Article VII of the CBA establishes the contractual evaluation and due process rights of members of the certificated supervisory unit, including Appellant. (CT 235-242). Article VII was the exclusive mechanism for evaluating the performance of and disciplining Appellant, which was never invoked. (CT 213, ln. 22-26). Appellant never received any notice that an adverse employment action would be taken against him. (CT 345). He was not provided with an opportunity to respond to the attack on his competency made by Romer to the *Los Angeles Times.*

The decision to remove Appellant could not have been made without the approval of the Board of Education ("Board"). (CT 317). Romer was required to obtain approval of the Board for transfers of LAUSD employees. (CT 317). There is no District record of a public meeting where Romer sought approval of the Board to remove or transfer Appellant,

and Respondents deny that a closed session meeting discussing the same occurred. (CT 332). Either Romer discussed the decision to remove Appellant with individual Board members, or did not discuss it with them at all. Either way, Romer's statements violated Appellant's constitutional, statutory and contractual rights, and Respondents' special motion to strike should have been denied.

## STATEMENT OF THE CASE

This action was filed on March 21, 2006. (CT 4). The complaint contains causes of action for invasion of privacy, wrongful discharge in violation of public policy, race-based discrimination, age discrimination, retaliation, defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. (CT 4).

The invasion of privacy cause of action alleged that Appellant had a legally protected privacy interest in his confidential personnel information under the California Constitution (Art. 1, § 1; the "privacy amendment"), the Ralph M. Brown Act (*Gov. Code* § 54950 et seq., "Brown Act"), the California Public Records Act (*Gov. Code* § 6250 et seq., "CPRA"), the CBA and public policy; that Appellant had a reasonable expectation of privacy in this information; and that a serious invasion of that privacy interest occurred when Romer bypassed established procedure by unilaterally making statements to the *Los Angeles Times*. (CT 11-12).

The defamation cause of action alleged that Romer spoke the following words of, and concerning Appellant, to a reporter from the *Los Angeles Times* newspaper: Romer stated that Appellant "had retirement plans that did not fit with the District's needs," and that Appellant's handling of the April and May 2005 disturbances had "accelerated" a decision to replace him. (CT 46). The complaint alleged that the statements were published in multiple articles in the *Los Angeles Times*, a newspaper of general circulation. (CT 46, 48). The complaint further alleged that the foregoing statements were false, and made in violation of the Brown Act. (CT 14-17).

On May 23, 2006, the Respondents brought the special motion to strike the First (invasion of privacy) and Sixth (defamation) causes of action under Code of Civil Procedure section 425.16, which is the subject of this appeal. (CT 65).

In granting the anti-SLAPP motion, the trial court prevented Appellant from conducting discovery. (CT 355). At the time Respondents made the motion, Appellant had not yet propounded any discovery or taken the depositions of the Respondents.

On June 23, 2006, the trial court granted Respondents' special motion to strike, and dismissed the first and sixth causes of action with prejudice. (CT 352). The court also awarded $6,325.00 as attorney's fees

to Respondents. (CT 355). According to the court, the First and Sixth causes of action fell within the purview of the anti-SLAPP statute, and Appellant failed to meet the burden of showing he was likely to prevail on the merits of those causes of action. These findings were made in error.

The trial court also erroneously struck several portions of Appellant's declaration in support of his opposition to the special motion to strike. (CT 355). The court sustained Respondents' objections without explanation. (CT 355).

This appeal followed.

## STANDARD OF REVIEW

Appellate courts review *de novo* a trial court's ruling on a motion to strike under section 425.16 by "conducting an independent review of the entire record." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) Appellate review is conducted in the same manner as the trial court in considering an anti-SLAPP motion. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal. App. 4th 659, 672-673.) However, the appellate court is not bound by the trial court's interpretation or application of constitutional or statutory provisions. (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1174.)

/ / /

/ / /

## A. Section 425.16 and the Code of Civil Procedure - Special Motion to Strike.

California's anti-SLAPP statute, Code of Civil Procedure section 425.16, authorizes a court to strike any cause of action that arises from "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue... unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Section 425.16(e) expressly defines the First Amendment activity from which a cause of action must arise within the meaning of section 425.16 in order to be the proper subject of a special motion to strike. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 647.) Section 425.16(e) identifies four categories of conduct that qualify as an "act in furtherance of a person's right of petition or free speech under the United states or California Constitution in connection with a public issue" under section 425.16:

"(1) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

/ / /

(2) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or

(4) Any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest."

(§ 425.16, subd. (e); *Dowling v. Zimmerman* (2001) 85 Cal.App. 4th 1400, 1418-1419.)

**B. Burden of Proof under Code of Civil Procedure Section 425.16.**

In *Navellier v. Sletten* (2002) 29 Cal.4th 82, the California Supreme Court explained the two-step process that courts must follow in determining whether an action is a SLAPP within the meaning of section 425.16. First, the court determines whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause of action fits one of the categories spelled out in section 425.16(e).

The Supreme Court has observed, "the 'arising from' requirement is not always easily met." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.) A cause of action does not "arise from" protected activity simply because it is filed after protected activity took place. (*City*

*of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77.) Nor does the fact "[t]hat a cause of action arguably may have been triggered by protected activity" necessarily entail that it arises from such activity. (*Id.* at p. 78.) The trial court must instead focus on the substance of the plaintiff's lawsuit in analyzing the first prong of a special motion to strike. (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 413-414.)

In performing this analysis, the Supreme Court has stressed, "the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati, supra*, 29 Cal.4th at p. 78.) In other words, "the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal. App. 4th 658, 669-670.)

While a defendant need only make a prima facie showing that the underlying activity falls within the ambit of section 425.16, "the statute envisions that the courts do more than simply rubberstamp such assertions before moving on to the second step." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819.)

If the court finds that the activity falls under section 425.16, it must then determine whether the plaintiff has shown a probability of prevailing

on the merits. (*Navellier*, *supra*, 29 Cal.4th at p. 88.) In order to establish the requisite probability of prevailing, the plaintiff need only have stated and substantiated a legally sufficient claim. "[T]he anti-SLAPP statute requires only a 'minimum level of legal sufficiency and triability.' [citation]." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738.) "Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Navellier*, *supra*, 29 Cal.4th at p. 88-89.) "Only a cause of action that satisfies both prongs of the anti-SLAPP statute-i.e., that arises from protected speech or petitioning and lacks even minimal merit-is a SLAPP, subject to being stricken under the statute." (*Id.* at p. 88-89.)

The standard is similar to that employed in determining motions for nonsuit, directed verdict or summary judgment, in that the court cannot weigh the evidence. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010.) The court does not weigh the credibility or comparative probative strength of competing evidence in determining whether plaintiff has demonstrated a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) When it considers defendant's affidavits, the court cannot weigh them against

plaintiff's, but must decide only whether they defeat plaintiff's supporting evidence as a matter of law. (*Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107.)

## ARGUMENT

### I.

### RESPONDENTS HAVE NOT MADE A PROPER SHOWING THAT ROMER'S STATEMENTS ARISE FROM AN ACTIVITY PROTECTED BY CODE OF CIVIL PROCEDURE SECTION 425.16

#### A. Romer's comments about Appellant's retirement plans and the reason for his removal were not "issues of public interest" within the meaning of Section 425.16, subdivision (e)(3).[4]

Appellant had an expectation of privacy in his employment matters under the Privacy Amendment, Government Code section 54957, Government Code section 54963, Government Code section 6254 subsection (c), the CBA, and decisional law. While student violence at LAUSD campuses is an issue of public interest, retirement plans and

---

[4] Respondents do not claim that Romer's comments were related to petitioning the government for redress of grievances pursuant to Section 425.16, subsection (e)(1) or (e)(2) in their Special Motion to Strike. (*See Du Charme*, *supra*, 110 Cal. App. 4th at p. 114.) Section 425.16 (e)(1) and (e)(2) have no application here. Romer was not petitioning the government when he spoke to the press.

potential disciplinary issues of District employees are not issues of public interest. As a District official, Romer was prohibited by the constitution, statute and contract from disclosing confidential personnel matters to the press. There is no authority which permits a public official to utilize confidential personnel information to publicly criticize a public employee.

1. Appellant had an expectation of privacy under the CBA.

Appellant had a reasonable expectation of privacy under the CBA. The CBA does not authorize the District or District officials to reveal to the press any personnel matters, specifically including job performance, or performance evaluation. (CT 214, ln. 10-12). District officials are aware that personnel matters may only be discussed in closed session of the Board of Education, subject to the Brown Act. (CT 214, ln. 12-15). Romer's statements to the *Los Angeles Times* violated the understanding that the AALA and District officials alike shared on the terms of the CBA.

Moreover, the CBA explicitly recognizes the importance of confidentiality in cases of conflict between the District and AALA members. (CT 244). When such a conflict arises, Article VIII, section 4.0 of the CBA requires complete confidentiality until resolution of the dispute. (CT 244). The section recognizes that such matters are not matters of public interest. "In order to encourage a professional and harmonious disposition of grievances, it is agreed that from the time a grievance is filed

until it is finally resolved, neither AALA, the District, the grievant nor any person acting in connection with any of them shall make public the grievance or evidence regarding the grievance." (CT 244).

2. Confidentiality of personnel matters is inherent in the Brown Act.

While the Brown Act generally requires that public meetings be open and public, section 54957 provides for a "personnel exception" to these requirements. (*Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672, 682.)

Government Code section 54957 permits closed sessions when "meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session."

The underlying purpose of the personnel exception is to protect public employees from public embarrassment and to permit free and candid discussions of personnel matters in closed sessions of a local government body. (*San Diego Union v. City Council of the City of San Diego* (1983) 146 Cal.App.3d 947, 955.) The Brown Act provides a procedural mechanism to protect a public employee's privacy rights protected by Article I, Section 1 of the California Constitution.

In 2002, the Legislature recognized the sensitive nature of personnel issues discussed during closed sessions of local government bodies by adding Government Code section 54963, which expressly prohibits disclosure of confidential information discussed in *any* closed session. Section 54963 states that "[a] person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section... 54957... to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information." Any remedy currently available by law may be used to address a violation of this section. (*Gov. Code* § 54963(c).)

In *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, the plaintiff filed a complaint which sought declaratory and injunctive relief against the defendant City Council members for violations of the Brown Act. The complaint alleged that three Brown Act violations occurred during a closed session. The trial court entered an order compelling the defendants to disclose their personal recollections of the closed session. The court of appeal held that the Brown Act does not provide for disclosure of personal recollections of members of a legislative body regarding proceedings held in closed session, and directed that the trial court order be vacated. (*Id.* at pp. 334-335.)

The *Kleitman* court, quoting the Attorney General, stated that "it

would be improper for information received during a closed session to be publicly disclosed without authorization of the governing body as a whole." (*Id.* at p. 334.) The *Kleitman* court stated that "Disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act." (*Id.* at p. 332.) (Emphasis added.)

Although *Kleitman* was decided before section 54963 was added to the Brown Act, the decision emphasizes the compelling presumption of confidentiality of both closed sessions and personnel information that has long existed in the realm of local public agency policy.

3. Public employees have a legally protected right of privacy in their personnel files under the California Public Records Act.

*Teamsters Local 856 v. Priceless, LLC* (2004) 112 Cal.App.4th 1500 held that public employees have a legally protected right of privacy in their personnel files. (*Id.* at p. 1512.) In *Teamsters*, unions representing public employees sought a preliminary injunction enjoining disclosure of detailed public salary information by several cities to a newspaper pursuant to the California Public Records Act. The court discussed the elements of a cause of action for invasion of the right to privacy guaranteed by the California Constitution, which requires: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) a serious invasion of the privacy

interest. "[O]ne class of legally protected privacy interest is informational privacy, or the right to preclude dissemination of personal, confidential information." (*Id.* at p. 1514.)

*Teamsters* recognized that the CPRA itself contains a legally protected right of privacy in individual personnel files, by virtue of the exemption in Government Code section 6254, subsection (c). Section 6254 contains a number of exceptions to the disclosure requirements of the CPRA. Subsection (c) states that "[n]othing in this chapter shall be construed to require disclosure of records that are of any of the following... [p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." *Teamsters* explained that "A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the record keeping activities of public employers and agencies." (*Teamsters*, *supra*, 112 Cal.App.4th at p. 1515.)

The CPRA is modeled after the federal Freedom of Information Act ("FOIA"), and California courts often look to federal decisions for guidance in handling matters under the CPRA. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 773.) Federal courts have held that personnel

records and other similar files, which are required to remain confidential, include intimate private details of personnel decisions. (*BRV v. Superior Court* (2006) 143 Cal.App.4th 742, *citing United States Department of State v. Washington Post Co.* (1982) 456 U.S. 595, 602.) The United States Supreme Court has also stated that personnel files may include "reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken or has been taken." (*Department of the Air Force v. Rose*, (1976) 425 U.S. 352, 377.) (Emphasis added.)

California courts have also held that employees have a protected right of privacy in their personnel files and records, requiring employers to maintain the confidentiality of their records. (*Harding Lawson Assoc. v. Superior Court* (1992) 10 Cal.App.4th 7, 10.) A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 926.)

4. Appellant has a constitutionally based liberty interest in his good name.

Appellant has a constitutionally based liberty interest in his good name which barred Romer from publicly disclosing stigmatizing

information regarding Appellant's performance. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 573.) "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." (*Id.* at p. 561.) Appellant relied on his good name to effectively perform his job as a school principal. Romer's comments arbitrarily undermined that reliance, and caused Appellant damages as discussed above.

5. Public policy demands that Appellant's personnel issues remain private.

None of the foregoing authorities permit a public employer to air grievances against employees by publication in a newspaper of general circulation. Permitting such conduct would cause the personal and private lives of every public employee to become front page news every time the employer could claim some kind of "public" interest in an employment matter. Public policy considerations demand that personnel issues be maintained in the strictest confidence to allow public employees to do their jobs without fear of public or private humiliation.

Romer, unlike general members of the public, was privy to confidential information about Appellant and personnel decisions, if any, concerning his employment. Appellant's retirement plans and LAUSD's alleged reasons for replacing him were private, confidential personnel

issues. Romer had no right to utilize the information obtained by virtue of his position to publicly criticize Appellant. (CT 46). Romer's statements breached the public trust attendant to his public office. Romer was well aware of this fact, as evidenced by his contacting Appellant and apologizing for making the statements. (RJN Exh.2, p.7, ln.23-28).

Personnel matters concerning Appellant's performance were confidential, not "an issue of public interest," and Romer was duty bound, by the Constitution, the Brown Act, the CPRA and the CBA to respect and protect the confidentiality of LAUSD employees.

Respondents have not cited a single authority suggesting that a public employer may reveal confidential personnel information about its employees to the public, effectively bypassing the employee's right to defend against charges and allegations. Such authority does not exist. The subject matter and content of Romer's comments to the *Los Angeles Times* were not matters of public interest under Code of Civil Procedure section 425.16(e)(3).

**B. Romer's comments were not made in a public forum or similar setting within the meaning of Section 425.16, subdivision (e)(3).**

Romer's statements to the *Los Angeles Times* impermissibly bypassed the well-established constitutional and statutory system designed to protect a public employee's right to defend against charges and

allegations. (*See, e.g. U.S. Const.*, 14th Amend.; *Gov. Code* § 54957.) The statements were not made in a public forum, as Romer was not expressing a "point of view" on a "matter of public interest." He was impermissibly disclosing Appellant's confidential personnel information to the press.

There is an explicit recognition under California and federal law that public employees have due process rights with respect to disciplinary matters. "Minimal standards of due process require that a public employee receive, prior to imposition of discipline: (1) Notice of the action proposed, (2) the grounds for discipline, (3) the charges and materials upon which the action is based, and (4) the opportunity to respond in opposition to the proposed action." (*Bollinger v. San Diego Civil Serv. Com* (1999) 71 Cal. App. 4th 568, 575-576, *citing Williams v. County of Los Angeles* (1978) 22 Cal. 3d 731, 736; *Skelly v. State Personnel Bd.* (1975) 15 Cal. 3d 194, 215.)

Further, Article VII of the CBA establishes the procedural due process rights of LAUSD administrators. (CT 213, 235). Article VII is the exclusive mechanism for evaluating the performance of and disciplining administrators like Appellant. (CT 213). LAUSD never invoked the provisions of Article VII regarding Appellant. (CT 213).

None of these procedures were followed by LAUSD in removing Appellant as principal of Jefferson High. Appellant was never told that his

"leadership skills" were inadequate or that he would be replaced. (CT 345). He was not given notice or provided with an opportunity to respond to Romer's assault on his "handling" of the student violence at Jefferson.

A "public forum" is traditionally defined as a place that is open to the public where information is freely *exchanged*. (*Damon v. Ocean Hills Journal Club* (2000) 85 Cal.App. 4th 468, 475.) (Emphasis added). In this case, there was no exchange of information. Neither Appellant nor the public was given an opportunity to respond to or discuss Romer's allegations in any kind of forum. The newspaper reporter did not speak with Appellant before publishing the statements. (CT 46). Romer's unilateral action circumvented the well-established public policy for dealing with the discussion of personnel matters, and did not occur in a "public forum" or a public setting within the meaning of Section 425.16(e)(3).

**C. Romer's statements are not protected by Code of Civil Procedure Section 425.16, subsection (e)(4).**

Appellant's removal as principal was not a "public issue" or an "issue of public interest" within the meaning of subsection (e)(4) for the same reasons discussed above. *Rivero*, *supra*, discussed three categories of subdivision (e)(4) speech activity: (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could

affect large numbers of people beyond the direct participants; and (3) the statement or activity precipitating the claim involved a topic of widespread public interest. (105 Cal.App.4th at p. 924.)

None of these criteria have been established here. As principal of Jefferson, Appellant was one of thousands of middle administrative personnel employed by LAUSD. There was no public debate or controversy about Appellant's qualifications or performance before Romer's statements were published in the *Los Angeles Times*. Appellant was not in the public eye until Romer directed the public's attention to Appellant and away from the District. (CT 46).

The fact that Appellant was in the public eye *after* Romer's statements does not transform the statements into ones about a topic in the public eye. "A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." (*Rivero*, *supra*, 105 Cal.App. 4th at p. 926.) Further, "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132, *citing Hutchinson v. Proxmire* (1979) 443 U.S. 111, 135.) (Emphasis added.)

Romer communicated Appellant's private information to a large number of people through the newspaper, and is now trying to claim it was

a matter of public interest. (CT 75). The information was not, is not, and never will be a matter of public interest. Romer's conduct forced Appellant into the public eye, and he cannot now claim that Appellant was a public figure to defend against Appellant's defamation claims.

The only person who was adversely affected by Romer's false statements was Appellant. Romer's statements did not involve conduct that could affect large numbers of people beyond the direct participants. The issue of school violence was the subject of public debate, not Appellant's retirement plans, transfer, or potential discipline. "The focus of the anti-SLAPP statute must be on the specific nature of the speech rather than on generalities that might be abstracted from it." (*Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 601.)

Romer's comments did not involve a public issue or an issue of public interest because the speech was specifically about the alleged reasons why Appellant was removed as principal of Jefferson. (CT 46). The alleged reasons behind an employment action have nothing to do with the greater, society wide problem of school violence. The generality of "school violence," might be abstracted from Romer's statements, but such abstraction is irrelevant for the purposes of anti-SLAPP analysis. (*Id.*)

*Braun v. The Chronicle Publishing Company* (1997) 52 Cal.App.4th 1036, 1048-1049, illustrates the distinction between a topic or event which

may be of public interest, and related confidential information which is not. In *Braun*, the defendant newspaper reported about an investigation being conducted by the state auditor, its subject matter, the documents relied upon by investigators, as well as the execution of a search warrant. The *Braun* court distinguished between these topics and events and the confidential audit itself, and held that the audit was an "official proceeding" for the purposes of section 425.16. The court said that while the investigative report itself is confidential, the topics on which the paper reported were not.

Even assuming, *arguendo*, that Appellant's removal was of public interest, Respondents failed to distinguish Appellant's removal as principal from the confidential reasons for his removal. Although Appellant's removal as principal of Jefferson may have been of public interest, the reasons supporting the decision to remove him are not. There was no public discussion of Appellant's leadership qualities, retirement plans, or how he "fit with the District's needs" prior to Romer's statements. These issues were confidential and not an "issue of public interest."

Thus, even if Appellant's removal was of public interest, the alleged reasons supporting the decision to remove him are not. Respondents failed to distinguish Appellant's removal as principal from the confidential reasons for his removal. There was no public discussion of Appellant's leadership qualities, retirement plans, or how he "fit with the District's

needs" prior to Romer's statements. These issues were confidential and not an "issue of public interest."

The removal of a principal from a high school only had the potential to *directly* impact those people who were directly involved with the school. This includes the students, parents, and staff of Jefferson. Courts have concluded that where only a limited, definable portion of the public is impacted, subsection (e)(4) does not apply. (*Du Charme*, *supra*, 110 Cal.App.4th at p. 119.)

Although members of the public may have been curious about why LAUSD decided to replace Appellant as principal, the term "public interest" does not equate with mere curiosity. (*Time Inc. v. Firestone* (1976) 424 U.S. 448, 454-455.) "Speech by public employees may be characterized as **not** of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances..." (*Chico Police Officers' Assn. v. City of Chico* (1991) 232 Cal. App. 3d 635, 644.) (Emphasis added).

Romer's statements do not fall within any category of speech under Code of Civil Procedure section 425.16, subsection (e)(4). They do not merit the protections of the anti-SLAPP statute, and Respondents' special motion to strike should have been denied.

/ / /

**D. Romer's statements were not based on an act taken in furtherance of his right of petition or free speech and Section 425.16 does not apply.**

In order for Code of Civil Procedure section 425.16 to apply, the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. (*Peregrine Funding*, *supra*, (2005) 133 Cal. App. 4th at pp. 669-670.)

The United States Supreme Court recently held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes..." (*Garcetti v. Ceballos* (2006) 126 S.Ct. 1951, 1960.) (Emphasis added). The trial court's order granting Respondent's special motion to strike was therefore incorrect as a matter of law and must be reversed.

*Garcetti* is applicable here. Respondents argued that Romer was acting in the official course and scope of his official duties when he made the statements to the *Los Angeles Times*. (CT 335). The court dismissed Appellant's First and Sixth causes of action on the ground that they "arise from statements made by Defendant Romer in furtherance of his constitutional right to free speech..." (CT 353) and "that the acts of which plaintiff complains were taken in furtherance of defendant's right of free speech under the U.S. Constitution in connection with a public issue..." (CT 357).

Additionally, Romer's statements were defamatory and false, and do not merit the protections of the First Amendment. "The First Amendment... does not embrace certain categories of speech, including defamation..." (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234.)

Romer, unlike general members of the public, was privy to confidential information about Appellant and any personnel decisions which were made concerning his employment. Romer's freedom of speech rights do not include the privilege to reveal confidential information whenever he sees fit. Rather, Romer had a statutory, constitutional and contractual duty not to reveal confidential personnel information pertaining to LAUSD employees. (*Cal. Const.* Art. 1, § 1; *Gov. Code* § 6254; *Gov. Code* § 54950 et seq.; CBA Article VII [CT 213, 235].) His statements to the *Los Angeles Times* were not made in furtherance of any speech right.

Romer's statements implicated the alleged reasons why LAUSD had decided to replace Appellant. (CT 46). While it was Romer's job to respond to public concerns presented to him concerning school violence, it was not his job to volunteer personnel matters. Courts have consistently held that informational or explanatory statements are not protected under section 425.16, since they do not further the statute's purpose of encouraging participation in matters of public significance. (*Du Charme*, *supra*, 110 Cal. App. 4th at p. 118.)

In *Du Charme*, the court determined that an explanation for the termination of an assistant business manager for fiscal mismanagement posted on a union website was not a "public issue or issue of public interest." (*Id.* at p. 119.) The court explained that "informational" statements of this type do not qualify for the protections of section 425.16, since they do not further the purposes of the anti-SLAPP statute. Specifically, the right to participate in public controversies would not be squelched if the right to make the statement were not protected. (*Id.*)

The *Du Charme* court reasoned that this conclusion was sound because the employment decision "was a *fait accompli*; its propriety was no longer at issue. Members of the local union were not being urged to take any position on the matter. In fact, no action on their part was called for or contemplated. To grant protection to mere informational statements, in this context, would in no way further the statute's purpose of encouraging participation in matters of public significance [citation]." (*Id.* at p. 118.)

Romer's statements were made in precisely the same context as the statements in *Du Charme*. Romer stated that LAUSD had already made the decision to remove Appellant, implying that formal action had been taken by the Board. (CT 46). Therefore, the propriety of the decision was no longer at issue. In fact, Romer and Lagrosa both stated that the determination to remove Appellant was made before Romer made the

statements to the *Los Angeles Times* reporter. (CT 85, 87). Nothing in the record shows that students, parents or staff of Jefferson High were being urged to take any position on Appellant's removal. No action on their part was called for or contemplated.

Instead, Romer unilaterally revealed confidential information purportedly relied on by LAUSD in making the decision to replace Appellant. Even if Romer was acting in the course and scope of his official duties, his statements do not merit First Amendment protection. The statements in no way contributed to Romer's right to *participate* in matters of public significance. The employment decision was a *fait accompli*, and Code of Civil Procedure section 425.16 should not apply.

**E. Romer's statements to the reporter were prohibited as a matter of law, and Section 425.16 does not apply.**

The scope of section 425.16 is not without limits. (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 864.) The anti-SLAPP statute is intended to "protect a defendant 'from a retaliatory action for his or her exercise of **legitimate**... rights.'" (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1366.) (Emphasis in original.) Code of Civil Procedure section 425.16, by its express terms, does not apply to any activity that can conceivably be characterized as being "in furtherance" of a defendant's protected speech or petition rights if, as a matter of law, that activity was

illegal and by reason of the illegality not constitutionally protected. (*Flatley v. Mauro* (2006) 39 Cal. 4th 299, 316, *citing Paul*, *supra*, 85 Cal.App.4th at p. 1367.)

When either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence, the motion must be denied. "The rationale is that the defendant cannot make a threshold showing that the illegal conduct falls within the purview of the statute and promotes section 425.16's purpose to prevent and deter lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (*Id.* at p. 316.)

If the courts rule that a defendant who has engaged in illegal behavior has met the first step of the motion to strike, the defendant can then shift the burden to the plaintiff and force his victim to marshal and present evidence early in the litigation before the commencement of full discovery. If the plaintiff/victim is unable to show a probability of prevailing, he will have to pay the defendant's attorneys fees. "These are grossly unfair burdens to impose on a plaintiff who is himself the victim of the defendant's criminal activity." (*Id.* at p. 318.) This is precisely what has occurred here.

///

///

1. If Appellant's replacement was not discussed in closed session, Romer's statements were illegitimate or false and not protected by section 425.16

Respondents alleged in their reply to Appellant's opposition to the special motion to strike that the Board of Education did not meet in closed session to discuss Appellant's replacement. (CT 332). If there was no closed session meeting, then Romer's statements to the *Los Angeles Times* were demonstrably illegitimate or false.

Specifically, Romer stated that Appellant's handling of the school riots had "accelerated" a decision to replace him. (CT 46). In fact, both Romer and Lagrosa stated that the decision to replace Appellant had already been made before Romer made the statements to the *Los Angeles Times* reporter. (CT 85, 87). Any decision to replace Appellant could only be made with the approval and consent of the Board of Education, in open or closed session. (*Educ. Code* § 35035(c); *Ellerbroek v. Saddleback Valley Unified School Dist.* (1981) 125 Cal App 3d 348.) No record of such a discussion during an open session exists.

Moreover, Article IX, Section 1.7 of the CBA, entitled "Administrative Assignments and Transfers," states that "The employee shall be informed and counseled regarding the transfer and written reason(s) for such transfer shall be supplied to the employee upon the employee's

request. Definitive reasons for the transfer will be given and a conference held with the employee prior to the change of assignment." (CT 250). The District did not follow these requirements before removing Appellant from Jefferson.

Thus, Romer was required to discuss Appellant's replacement with the Board of Education. If any consensus or discussion concerning Appellant's replacement occurred outside a duly authorized meeting of the Board of Education, the Brown Act was violated in the form of a serial meeting. (*Gov. Code* § 54952.2.)

The Brown Act expressly prohibits serial meetings. (*Id.*) A serial meeting is a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the body's members. (*Id.*) The prohibition extends to all forms of communication, whether through direct commun-ication, personal intermediaries or technological devices for the purpose of developing a concurrence as to action to be taken. (*Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 103.) The purpose of the prohibition is to prevent public bodies from circumventing the requirement for open and public deliberation of issues. (*Gov. Code* § 54952.2.) (Emphasis added.)

/ / /

In *Stockton*, the court concluded that a series of individual telephone calls between the agency attorney and the members of the body constituted a meeting. (*Id.* at p. 105.) The attorney individually polled the members of the body for their approval on a real estate transaction. The court concluded that even though the meeting was conducted in a serial fashion, it nevertheless was a meeting for the purposes of the Act.

Similarly, in *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 796-798, the court concluded that the Brown Act applies equally to the deliberations of a body and its decision to take action. If a collective commitment was a necessary component of every meeting, the body could conduct most or all of its deliberation behind closed doors so long as the body did not actually reach agreement prior to consideration in public session. Accordingly, the court concluded that the collective acquisition of information constituted a meeting.

Like *Stockton* and *Frazer*, Romer's statements circumvented the Brown Act's requirement for deliberation of issues in a closed session of a regularly agendized Board of Education meeting. Respondents admit that Romer acted as an intermediary between the public and LAUSD. (CT 87). When he made the statements about Appellant, he spoke for both himself and LAUSD, including its Board of Education.

Romer would have to discuss Appellant's replacement with members

of the Board of Education in order to establish a concurrence about the issue, otherwise he could not speak on behalf of the Board. Since Respondents have claimed no closed session occurred, Romer must have spoken to the Board of Education individually, in a prohibited serial fashion. Such conduct violates the express provisions of the Brown Act.[5]

On the other hand, if Romer had no conversations with the Board of Education regarding Appellant's replacement, then his statements to the *Los Angeles Times* were false, and no "decision" to replace Appellant had been made. "Libelous utterances are not within the area of constitutionally protected speech." (*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568; *Roth v. United States* (1957) 354 U.S. 476.) Further, "The First Amendment... does not embrace certain categories of speech, including defamation..." (*Ashcroft*, *supra*, 535 U.S. at p. 245-46.)

In either case, Romer's statements do not merit protection under section 425.16.

2. If Appellant's removal was discussed in closed session, Romer's statements were prohibited by Government Code section 54963 and are not protected by section 425.16

---

[5] Violations of the Brown Act may be considered a misdemeanor and may be remedied any means currently available by law. (*See Gov. Code* §§ 54959, 54963.)

If Appellant's removal as principal was discussed during a closed session meeting of the Board of Education, Romer's comments to the reporter were illegal as a matter of law and not made in furtherance of any legitimate rights.

If there were any closed sessions, then Romer's statements to the *Los Angeles Times* concerning the alleged reasons behind the replacement decision illegally revealed closed session information. Government Code section 54963 states that "[a] person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section... 54957...to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information."

Unlawful disclosure of confidential closed session communications may be treated as a misdemeanor under state law, punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding $1,000, or both. (*Penal Code* § 19; *Gov. Code* § 54959; *Gov. Code* § 1222.) California's Attorney General concluded that "oral communications of [closed session discussions] may not be made to the public." (76 *Op. Atty Gen. Cal.* 289, 291 (1993).) While opinions of the Attorney General are not binding on courts, they may be persuasive. (*See Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050, 1057.)

/ / /

Courts have agreed with the Attorney General's conclusions. "Disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act." (*Kleitman, supra*, 74 Cal. App.4th at p. 332.) (Emphasis in original.)

If there were any closed sessions, Romer's statements were illegal as a matter of law. They were not made in the exercise of Romer's legitimate rights. Therefore, the statements would not fall within the protections of section 425.16.

**F. Authorities cited in Respondents' special motion to strike are distinguishable or inapplicable**

Respondents cite several authorities which do not support the theories propounded in their special motion to strike.

Respondents cite *Leventhal v. Vista Unified Sch. Dist.* (1997) 973 F.Supp. 951, for the proposition that Appellant could not prevent Romer from making derogatory comments about his work performance to the public. *Leventhal* does not support such a proposition.

*Leventhal* speaks to the right of the public to address the Board pursuant to a provision of the Brown Act permitting public comment. (*Gov. Code* § 54954.3). *Leventhal* does not address the constitutional, statutory, and contractual duties of public officials to maintain the confidentiality of

personnel matters. (*See* Section I (A), *supra.*) It is well established that a case is not authority for matters not considered. (*People v. Vital* (1996) 45 Cal. App. 4th 441, 445.)

Romer was not a member of the public in the context of *Leventhal*. Romer spoke, and was quoted in the *Los Angeles Times* article as a public official and the Superintendent of LAUSD, Appellant's employer. He was not speaking as a member of the general public on the issue of Appellant's qualifications as a high school principal. Romer was privy to confidential personnel information that the public did not have access to, and his comments revealed that information. As Appellant's employer, Romer had a statutory, constitutional and contractual obligation to protect the privacy of LAUSD employees.

*Leventhal* does not stand for the proposition that a public employer may use confidential personnel information to freely criticize its employees in a newspaper of general circulation. As discussed above, constitutional, statutory and contractual provisions protect the confidentiality and privacy of sensitive personnel information concerning public employees. "It is well established that defamation of an individual is not protected by the constitutional right of free speech." (*Weinberg*, *supra*, 110 Cal. App. 4th at pp. 1131-1133, *citing Beauharnais v. Illinois* (1952) 343 U.S. 250.)

The factual and legal context of *Leventhal* is distinguishable from

this case. *Leventhal* does not address a school district superintendent's invasion of an employee's personal privacy. Rather, *Leventhal* centered on a school district bylaw that prohibited members of the public from criticizing school district employees at school board meetings. The United States District Court found that the board was impermissibly preventing members of the public from addressing matters of public concern at meetings that were open to the public. *Leventhal* is not applicable here.

Respondents also cite *Leventhal* for the proposition that "debate over public issues, including the qualifications and performance of public officials, such as a school administrator, 'lies at the heart of the first amendment' [Citiation]." (*Leventhal*, *supra*, 973 F.Supp. at p. 958.)

Again, the facts of *Leventhal* occurred in the context of a member of the public debating performance of public officials, not in the context of a public official revealing personnel information about an employee. Moreover, there was no public debate, or any public discussion whatsoever, about Appellant until Romer made his comments to the *Los Angeles Times*. "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (*Hutchinson*, *supra*, 443 U.S. at p. 135.) A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. (*Rivero*, *supra*, 105 Cal.App.4th at p. 926.)

*Vargas v. City of Salinas* (2005) 135 Cal.App.4th 361, cited and relied upon by Respondents numerous times in the special motion to strike, is a depublished case. Pursuant to Rule 977 (a), California Rules of Court, courts and parties are prohibited from citing or relying on any unpublished opinion in any action or proceeding. *Vargas* was depublished by the Supreme Court on April 26, 2006, and was depublished before Respondents made the motion. Specifically, Respondents rely on *Vargas* on p. 4 ln.19-22 and p.5 ln.1-6, 13-14 of the special motion to strike (CT 74-75). This court should refuse to consider all arguments of Respondents that rely on *Vargas* as precedent.

*Fontani v. Wells Fargo Investments, LLC.* (2005) 129 Cal.App.4th 719, also cited by Respondents, was overruled in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal. 4th 192. Furthermore, it is a case which deals with section 425.16, subsection (e)(1) and (e)(2), which Respondents did not raise in the special motion to strike. The facts are completely different than those here, and it offers no assistance to the Court.

*Ingram v. Flippo* (1999) 75 Cal.App. 4th 1280, cited by Respondents has no application here. *Ingram* does not involve personnel issues involving the provisions of a collective bargaining agreement. *Ingram* is a Brown Act case where the court held that the proper defendant was the Board and not individual Board members. Whether or not several Board

members violated the Brown Act is unrelated to Romer's unauthorized release of confidential information, information which was false, and information which he was not authorized to release publicly.

The federal cases cited by Respondents do not apply. In *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, the United States Supreme Court held that a newspaper or broadcaster publishing defamatory falsehoods about an individual who was neither a public official nor a public figure could not claim constitutional privilege against liability.

*Stevens v. Tillman* (1988) 855 F. 2d 394 addressed defamation claims against the president of a parent-teacher association. It did not address privacy rights established by the California Constitution, the Brown Act, the California Public Records Act or the CBA. It simply has no application here.

*Waldbaum v. Fairchild Publications Inc.* (1980) 627 F.2d 1287, determined that a vocal advocate of certain precedent-breaking policies was a limited purpose public figure. He was not a public school principal whose job performance and personal retirement matters had been wrongfully discussed with the press.

///

///

///

## II.

## APPELLANT HAS ESTABLISHED THAT THERE IS A PROBABILITY HE WILL PREVAIL AT TRIAL ON HIS CLAIMS OF INVASION OF PRIVACY AND DEFAMATION

### A. Respondents' conduct invaded Appellant's privacy rights.

In *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1, the California Supreme Court set out the elements of a cause of action for invasion of the right to privacy guaranteed by the California Constitution. (Art. I, § 1.) The Court stated that a plaintiff must show: (1) A legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) a serious invasion of the privacy interest. In explaining these three factors, the court stated that one class of legally protected privacy interest is informational privacy, or the right to preclude dissemination of personal, confidential information.

As discussed in detail above, Romer's statements were made in violation of Appellant's legally protected privacy rights under the California Constitution, the Brown Act, the CPRA, the CBA, and decisional law. Appellant had a reasonable expectation that his confidential personnel information would not be disseminated to the general public. When the statements were published in the *Los Angeles Times*, a newspaper of general circulation, Appellant's privacy interests were severely compromised.

**B. Romer's comments were per se defamatory.**

Defamation is either: (a) Libel and/or (b) Slander. (*Civ. Code*, § 44.) To constitute libel or slander, the published statement must be false. (*Civ. Code*, §§ 45, 46.) Civil Code Section 46 provides, in pertinent part, that slander is "a false and unprivileged publication, orally uttered...which (3) [t]ends to directly injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession or trade, or business that has a natural tendency to lessen its profits."

The Attorney General has pointed out that "[t]here is no question but that premature publicity concerning one's job performance may cause great and possibly unjustified damage to one's personal reputation." (59 *Op. Atty Gen. Cal.* 532 (1976).) Romer's statements prematurely publicized Appellant's job performance and greatly damaged his personal reputation. (CT 9). Romer's statement that the events at Jefferson had "accelerated" a decision to replace Appellant implied that Appellant was not an effective leader. Indeed, the *Los Angeles Times* article stated that Romer's comments were made in the context of "questioning" Appellant's leadership qualities. (CT 46).

/ / /

Appellant was not even aware of the allegations until he read them on the front page of the *Los Angeles Times*. (CT 46). Furthermore, Appellant was denied a proper forum within which to defend against the baseless charges. He suffered personal and professional embarrassment, and humiliation in the community as a result. (CT 9).

"Words which fall within the purview of Civil Code section 46 are deemed to constitute slander per se with the effect that the utterance of such words is actionable without proof of special damage." (*Albertini v. Schaefer* (1979) 97 Cal.App.3d 822, 839.) The burden of pleading and proving truth is generally on the defendant in a defamation action. (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 n.5.)

Both Romer and Lagrosa knew, and continue to be aware of the fact that the statements Romer made to the press were false. In fact, Romer admitted to Appellant that he had bad information and that his statements to the press were false. (RJN Exh.2, p.7, ln.23-28). If, as Respondents allege, the Board of Education did not meet and discuss Appellant's removal as principal (CT 332), then Romer's statement that the events at Jefferson had "accelerated" a decision to replace Appellant was false.

Both Romer and Lagrosa made public statements that were contradictory to statements in their declarations supporting the Respondents' special motion to strike and Romer's comments to the *Los*

*Angeles Times*. Lagrosa's declaration in support of the special motion to strike, made under oath, states "[I] spent a lot of time at Thomas Jefferson High School in April and May 2005. During that time, I formed the opinion that Mr. Morrow was not providing strong leadership and therefore should be replaced at the end of the 2004-2005 school year." (CT 85).

This statement is contradicted by statements she made on June 17, 2005, as part of a radio station program entitled "Talk of the City," on 89.3 KPCC FM:

> "Well, those of us who have worked with him, who have been on the campus, working with him day to day, um, none of us have blamed Mr. Morrow. We know that the circumstances that have occurred there at Jefferson are the result of multiple variables, many of which he has focused on he described very clearly and so we know that as he said he has he has been there, he wants to be known as someone who has been compassionate, as a fair and a good leader and *I would agree with those points*." (Emphasis added.) (RJN Exh.6, p.15, ln.8-22).

Romer's Declaration in support of the special motion to strike is a virtual mirror image of Lagrosa's. He states that he relied on information Lagrosa gave him about Appellant's job performance. (CT 87). He further states that "I concluded that Mr. Morrow had not been successful in controlling the student population at Jefferson, and that, because of the way he handled the student disturbances, he had to be replaced at the end of the 2004-2005 school year." (CT 87). Lagrosa's conflicting statements above

show that Lagrosa failed to tell Romer what he claims to have said.

Additionally, Romer declared that "the issue of violence goes beyond the schools..." at the public portion of the May 31, 2005 closed session meeting of the Board of Education of the City of Los Angeles. (RJN Exh.7, p.2). Romer knew, at the time he made the statements to the Los Angeles Times reporter, that Appellant was not responsible for the violence that occurred at Jefferson.

Romer's apology shows the recklessness of Romer's comments to the *Los Angeles Times*. The comments constitute slander per se because they were false and had, and continue to have, a detrimental impact on Appellant's "office, profession, trade or business." (*Civ. Code* § 46.)

California courts have long recognized that a defamation action is available to a school principal against whom false statements have been made that directly injure him with respect to his or her office, profession, trade, or business. (*Civ. Code* § 46(3).)

*Oberkotter v. Woolman* (1921) 187 Cal. 500 illustrates this point. In *Oberkotter*, defendant reported to the media that plaintiff, a public school principal, was one of the "weak spots" in the public school system. The plaintiff sued for slander, alleging that the defendant made slanderous, unprivileged, and uncalled-for statements to a newspaper reporter, knowing and intending that the statements would be given further circulation in the

media. The principal alleged that the slanderous remarks injured him and his reputation in his profession and caused him to be terminated.

In the complaint, plaintiff alleged that he had always conducted himself with diligence and industry, and had acquired and was acquiring gain and profits from the pursuit of his calling. The Court of Appeal held that plaintiff stated a cause of action for slander since being identified by the city superintendent as a "weak spot in the public school system of instruction," tended naturally, necessarily and proximately to produce "a general disqualification in those respects which the profession of teaching peculiarly requires." (*Swan v. Thompson* (1899) 124 Cal. 193, 199.)

**C. Appellant was neither a public figure nor public official.**

Appellant is one of thousands of middle administrative personnel employed by LAUSD. Numerous LAUSD campuses have experienced racial and ethnic disturbances. (CT 46). Appellant was not in the public eye until Romer put him there, and is neither a public official nor a public figure. (*See* Section I (C), *supra*.) There is no legal justification for Romer to deflect attention from himself, LAUSD and Lagrosa by publicly blaming a hardworking high school principal. (CT 46).

Not until Romer dragged Appellant's professional reputation through the mud did the general public have any question about Appellant's job performance or qualifications. The law is clear that a defendant may not

create its own defense of public official/public figure by making the Plaintiff a public figure. (*Hutchinson*, *supra*, 443 U.S. 111; *Vegod Corporation v. American Broadcasting Cos.* (1979) 25Cal.3d 769.)

The Restatement Second, Torts, Section 580A states the rule of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, regarding public officials or public figures as follows:

> "One who publishes false and defamatory communications concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person or (b) acts in reckless disregard of those matters."

Appellant contends that Romer knew the falsity of the statements and lacked any basis for believing them to be true, and yet, acted in reckless disregard of those matters knowing that personnel matters can only be discussed in closed session pursuant to the Brown Act and the CBA.

Witkin, Summary of California Law 10th Ed. Torts Section 603, discusses persons who are not public officials.

> "The Supreme Court's visions of a 'public official' is someone in the government's employ who: (1) has, or appears to the public to have substantial responsibility for or control over the conduct of governmental affairs; (2) usually enjoys significantly greater access to the mass media and therefore a more realistic opportunity to contradict false statements than the private individual; (3) holds a position in government

> which has such apparent importance that the public has an independent interest in the person's qualifications and performance beyond the general public interest in the qualifications and performance all government employees; and (4) holds a position which invites public scrutiny and discussion of the person holding it entirely apart from the scrutiny and discussion occasioned by the particular controversy." (*Id. citing Mosesian v. McClatchy Newspaper* (1988) 205 Cal.App.3d 597.)

Appellant had no responsibility for nor any control over the conduct of governmental affairs. He did not enjoy significantly greater access to the mass media. In fact, he only responded to the media when ordered to do so by his superiors. (RJN Exh.2, p.9, ln.13-17). Romer knew that Appellant's qualifications and performance could only be discussed in closed session of the Board of Education pursuant to the Brown Act, the CBA, and Article 1, Section 1 of the California Constitution.

In *Franklin v. Benevolent and Protective Order of Elks Lodge No. 1108, et al.* (1979) 97 Cal.App.3d 915, the Court of Appeal held that a high school teacher was not a public official or a public figure within the meaning of the *New York Times* rule. A school teacher, like a school principal, is in no position to control the conduct of government. "The governance or control of which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical. Far too much so, in our view, to justify exposing each public

classroom teacher to a qualifiedly privileged assault upon his or her reputation." (*Franklin*, *supra*, at p. 924.)

A high school principal is an employee of the LAUSD who serves under a chain of command consisting of his Director, the local District Superintendent, the District Superintendent, and the Board of Education. A principal of a high school in South Los Angeles is hardly in a position to control the conduct of governmental affairs.

Likewise, the courts have rejected the classification of an individual as a "public figure" where a third person has brought him into the limelight. For example, it has been held that simply being a member of the clergy does not make one a public figure. (*Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1273.) In *Wolston v. Reader's Digest Association* (1979) 443 U.S. 157, the United States Supreme Court held that a person's involuntary involvement in a matter of public interest did not make him a public figure. In *Franklin*, *supra*, the court held that the teacher was not a public figure; she did not take her case to the public or acquire "a special prominence." Romer placed Appellant in a position of "special prominence" by improperly addressing the media.

///

///

///

**D. Romer's comments to the reporter were not privileged under Civil Code section 47.**

California Civil Code section 47 provides, in pertinent part:

> "A privileged publication is one made:
> (a) In the proper discharge of an official duty.
> (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law."

Romer's statements were not made in the proper discharge of an official duty. No statement regarding a personnel matter which procedurally must be discussed in closed session is a subject for release to the press. The statements are unprivileged.

There is no authority which states that the Section 47(a) applies to school superintendents. Respondents admit that the privilege only extends to governing boards of school districts, not superintendents. Respondents only argue that the "privilege applies to governing boards of school districts, and, therefore, *should* extend to Romer as Superintendent of Schools." (CT 81, ln. 22-23). (Emphasis added.)

It is well established that courts should not read language into a statute. If the Legislature intended this statutory privilege to apply to school superintendents, it would have included language indicating that fact. The Legislature has not done so, and neither should this Court.

/ / /

In *Sanborn v. Chronicle Publishing Co.* (1976) 18 Cal.3d 406, the California Supreme Court decided whether to apply the privilege to a county clerk who made statements to the news media concerning improper pressure on him to release certain funds. "It has been noted by recognized authorities that the purpose of the so-called absolute 'official duty' privilege is to ensure efficiency in government by encouraging policy-making officials to exercise their best judgment in the performance of their duties free from fear from general tort liability. . . as we discussed below in greater detail, we have concluded that the defendant Mongan was not exercising policy-making functions when he defamed Appellant and thus he is not protected by the absolute privilege contained in Civil Code section 47..." (*Id.* at p. 413.)

The policy-making function of LAUSD is reserved to the Board of Education, not the Superintendent, who executes its policies. Making defamatory statements and/or releasing confidential information is not permitted by the Brown Act and CBA. Romer's defamatory statements were not made by the Board, were not given at a Board meeting, apparently were not authorized by the Board, and were made by the District's chief executive officer while speaking to the *Los Angeles Times*. The absolute privilege of Civil Code section 47 does not apply.

///

Respondents' argument and the cases cited thereunder do not address statements made in excess of the official's authority. To provide unbridled authority to Romer to state whatever he wished would allow him to disclose Appellant's social security number, medical information and other information clearly protected by Appellant's privacy rights.

In *Sanborn*, *supra*, the Clerk testified that he had released certain funds and he told a reporter with a newspaper that "It was a real con job." The court held that the Clerk was not protected by the absolute privilege of Civil Code section 47 and that he was not exercising policy-making functions when he defamed the appellant. *Sandborn* also held that the clerk's interview with the press was not a discretionary act within the meaning of Government Code section 820.2.

The principles of *Sanborn* apply to this case. Romer executes the policy decisions of the Board of Education. He does not make policy, and cannot perform policy-making functions. Thus, neither the absolute nor conditional privileges of Civil Code section 47 apply to Romer's statements published in the June 1, 2005 edition of the *Los Angeles Times*.

///

///

///

## III.

## THE TRIAL COURT IMPROPERLY STRUCK PORTIONS OF APPELLANT'S SUPPORTING DECLARATIONS AND SEVERELY IMPAIRED HIS ABILITY TO PRESENT ADMISSIBLE EVIDENCE

Section 425.16(b)(2) states that a court "*shall* consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based" when evaluating the merits of a special motion to strike. (Emphasis added.)

The trial court failed to fully consider Appellant's supporting affidavits which stated facts upon which liability is based, as required by law. The court overruled Respondents' objections that Appellant's declarations were untimely, but sustained Respondents' objections to the content of the declarations, striking significant portions. (CT 355). The trial court did so without explanation of the grounds for its ruling.

The ruling was improper. Under the second prong of the anti-SLAPP analysis, a court must make an assessment of a Appellant's probability of prevailing on the claim, and does so by looking "to trial, and the evidence that will be presented at that time." (*See Wilcox v. Superior Court*, *supra*, 27 Cal. App. 4th at p. 824.) The stricken portions of Appellant's supporting declarations contain facts which constitute admissible evidence.

/ / /

**A. The stricken portions of Appellant's supporting declarations contain admissible evidence and the trial court's ruling must be reversed.**

Under Evidence Code section 702, subsection (a), "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." Both of Appellant's supporting declarations contained statements that "Each fact contained herein is personally known to me and if called to testify I could competently testify thereto." (CT 212; RJN Exh.2, p.1). The declarations were executed under penalty of perjury. (CT 215, RJN Exh.3, p.3, ln.19-23). Thus, the factual allegations contained in the declarations constitute admissible testimonial evidence.

Respondents' "objections" to Appellant's supporting declarations are filled with general citations to various sections of the Evidence Code, and provide no explanation as to why or how the challenged statements in the declaration are barred by the cited portion of the Evidence Code. (RJN Exh.4, 5). Simply because a fact is in dispute does not mean that it cannot properly be part of a declaration. (*See In re Marriage of DeRoque*, (1999) 74 Cal. App. 4th 1090, 1093-1094.)

As discussed above, a court must not weigh the credibility or comparative probative strength of competing evidence in determining

whether the plaintiff has demonstrated a prima facie showing of facts to sustain a favorable judgment. (*Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at p. 821.) When it considers defendant's affidavits, the court cannot weigh them against plaintiff's, but must decide only whether they defeat plaintiff's supporting evidence as a matter of law. (*Du Charme*, *supra*, 110 Cal.App.4th 107.) Specifically, the trial court sustained Respondents' objections to Appellant's declaration as to items 1 through 13 and 16 through 21 consecutively listed on pages 3 through 8 of the written objections. (CT 355). The trial court should not have sustained these objections.

**B. The trial court's ruling unfairly prejudices Appellant.**

By striking Appellant's supporting declarations, the trial court made Appellant's task of satisfying the second prong of the anti-SLAPP analysis all but impossible. Since Appellant has been prevented from conducting full discovery, and some evidence Appellant has available can only be presented by supporting declaration. Respondents were aware of this fact and sought to strike Appellant's supporting declaration in order to prevent him from presenting relevant evidence.

It would be a manifest injustice to prevent Appellant from presenting evidence in this case because of a clerical error, which was corrected by a notice of errata before the hearing. (RJN Exh.3). This Court should consider

the declarations in their entirety.

**C. Respondents were not prejudiced by a clerical error.**

Respondents were clearly not prejudiced in preparation for their opposition since both declarations, in their entirety, were served with Appellant's opposition to the special motion to strike. (CT 308). The declarations were accepted by Respondents' counsel at the time they were submitted. Respondents were aware of the substantive content of the declarations and had adequate time to prepare opposition to them. The content of the declarations was never changed.

The fact that Appellant's declaration were allegedly unsigned was the result of a clerical error, as explained by Appellant's counsel in the Notice of Errata. (RJN Exh.3). The signed verification was intended for Appellant's declaration, but simply contained the wrong title. (RJN Exh.2, p.10). This error was easily correctable and was corrected.

Moreover, Respondents failed to cite any authority which stands for the proposition that a declaration cannot be signed by way of verification. Appellant signed the verification in question under penalty of perjury under the laws of the State of California, and named the place and date of the signing. (RJN Exh.2, p.10). Appellant's other supporting declaration was signed and dated. (CT 215).

/ / /

## IV.

## RESPONDENTS FAILED TO MEET THE REQUISITE BURDENS OF PROOF ON AFFIRMATIVE DEFENSES RAISED IN THE SPECIAL MOTION TO STRIKE

Although section 425.16 places on the Appellant the burden of substantiating his or her claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal. App. 4th 464, 477.)

Similarly, in *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal. App. 4th 90, 113 the court noted, in the context of a section 425.16 analysis, that the defendants had failed to carry their burden of establishing their allegedly defamatory statements were protected under the conditional privilege of Civil Code section 47.

Like *Mann*, Respondents failed to meet their burden of proof in the affirmative defense alleged under Civil Code section 47. They have presented no evidence beyond mere argument that Civil Code section 47(a) applies to school superintendents. They have not presented any evidence that Romer was authorized to make unilateral employment decisions about LAUSD employees and administrators.

Respondents have not shown that when Romer told the reporter a

decision to replace Appellant had been "accelerated," he was exercising a policymaking function. To the contrary, Appellant has shown that Romer was under a constitutional, statutory and contractual duty to comply with the procedural requirements of the Brown Act and not to violate Appellant's privacy rights. The policy-making function of LAUSD is reserved to the Board of Education, not the Superintendent, who executes its policies.

Furthermore, in defamation actions, the burden of proving a statement true or false is on the defendant. "[T]he issue of truth is on the defendant, the burden of pleading should likewise be on him. Accordingly, a plaintiff need not allege the statements are false." (*Lipman v. Brisbane Elementary School Dist.* (1961) 55 Cal.2d 224, 233.)

Respondents failed to show that Romer's statements were true. Respondents argue that the statements were opinion, but this cannot be so. Romer's comments to the reporter related to the supposed reasons for Appellant's removal as principal of Jefferson High School, and therefore constitute provable factual assertions. (*Moyer v. Amador Valley Joint High School District* (1990) 225 Cal.App.3d 720, 724.) Respondents admit that part of Romer's job was to speak for LAUSD on current issues. (CT 87). Thus, when Romer made his comments to the reporter, Romer did not give his opinion, but LAUSD's official *factual* position on the matter.

In some cases, a plaintiff may be required to prove falsity when the issue is a matter of public concern. (*Nizam-Aldine v. Oakland* (1996) 47 Cal.App.4th 364, 373.) However, as explained above, Appellant's confidential, sensitive personnel information was not a matter of public concern. Romer erred when he disclosed confidential personnel matters to the press.

There is also a limited exception to this rule where the plaintiff is determined to be a public official or public figure. As explained in detail in sections I (C) and II (C) above, Appellant was neither a public official nor public figure. He was not in the public eye until Romer put him there with the comments made to the *Los Angeles Times* reporter. Therefore Appellant should not be required to prove falsity.

Even if this Court finds that Appellant was a public figure or public official, he has shown that the statements were false, and made with reckless disregard as to their truth or falsity. In order for a statement to be proven true, "the substance, the gist, the sting, of the libelous charge [must] be justified. Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" (*Vogel v. Felice* (2005) 127 Cal. App. 4th 1006.)

Romer's comments were not justified. Appellant has stated that his

leadership had absolutely nothing to do with the outbreaks of violence at Jefferson High School. The disturbances were a product of an epidemic of violence which swept across many schools in the LAUSD. Appellant has shown that the problems were not isolated, but systemic. Romer's statements were obviously false, and made with reckless disregard for their truth. Respondents' motion to strike should have been denied.

## V.

## THE TRIAL COURT ERRONEOUSLY AWARDED ATTORNEY FEES

When a special motion to strike under Code of Civil Procedure section 425.16 is granted as to only one of many causes of action, an award of attorney fees is improper. (*Endres v. Moran* (2006) 135 Cal.App.4th 952.) In *Endres*, the defendants brought an anti-SLAPP motion against the Appellant's eight causes of action. The trial court denied the motion except as to one cause of action, and denied attorney fees. On appeal, this court explained that the denial of attorney fees was proper, since the effect of the motion had little or no impact on the actual litigation of the case.

The trial court's award of attorney fees in granting Respondents' anti-SLAPP motion was improper. If this Court reverses the trial court's order granting the special motion to strike, it should also reverse the order granting Respondents' attorney fees, and grant Appellant attorney fees.

Likewise, if this Court reverses the trial court as to one cause of action but not the other, it should reverse the order granting attorney fees as it did in *Endres*.

Even if this Court affirms the trial court's ruling as to the special motion to strike, the order granting attorney fees should be reversed since the parties will still have six causes of action to litigate. As this court aptly stated in *Endres*, "To be blunt, defendants' motion accomplished nothing, except that plaintiffs were put to the cost of defending the motion." (*Id.* at p. 955.) "That does not entitle them to fees." (*Id.* at p. 956.)

## CONCLUSION

Based on the foregoing, it is respectfully requested that this Court reverse the trial court's ruling granting Respondents' anti-SLAPP motion, and direct the trial court to issue an order denying Respondents' special motion to strike in its entirety, to issue an order reversing the award of attorney fees to Respondents, and to issue an order granting attorney fees to Appellant.

Dated: December 15, 2006

Respectfully submitted,
PARKER & COVERT LLP

By: _____
Henry R. Kraft
Attorney for Plaintiff-Appellant
Norman K. Morrow

**CERTIFICATE OF WORD COUNT**
(Cal. Rules of Court, Rule 14(c)(1))

The text of this brief consists of 13,969 words as counted by the Corel WordPerfect version 12 word-processing program used to generate this brief.

Dated: December 15, 2006

PARKER & COVERT LLP

By: _____
Henry R. Kraft
Attorney for Plaintiff-Appellant
Norman K. Morrow